No. 85-595

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

DONALD DELLA PORTA,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION, F.A.A.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOEL A. MOTT, JR.
MOTT AND MOTT
Attorneys for Petitioner
Ten Hundred West Avenue
P.O. Box 385
Ocean City, New Jersey 08226-0385
(609) 399-7577

2818
Lutz Appellate Printers, inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
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QUESTION PRESENTED

Whether petitioner, an air traffic controller, has been deprived of his procedural due process rights under the United States Constitution when the Chief Controller failed to consider a timely filed answer prior to rendering his decision.

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No.

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October Term, 1985

DONALD DELLA PORTA,

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DEPARTMENT OF TRANSPORTATION, F.A.A.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OPINIONS BELOW

This action was commenced on September 10, 1981 by an appeal filed on behalf of the petitioner, Donald Della Porta, to the Merit Systems Protection Board from the decision of the Chief Controller of the Atlantic City Tower FAA Facility Department of Transportation, removing him from the position of Air Traffic Controller Specialist G.S.-2152-12 for the reason that he had violated 5 U.S.C. § 7311 "an individual may not accept or hold

a position in the Government of the United States if he participated in a strike aqainst the United States and 18 U.S.C. § 1918 which makes participation in a strike against the Government of the United States a crime of which a sentence of imprisonment can be imposed." The second reason for his removal was on the basis of an unauthorized absence alleging that on the 1548 p.m.-2348 p.m. shift of August 4, 1981, he failed to report for a scheduled tour of duty and alleging that on August 3, 1981 a telegram was sent stating that an illegal strike was in progress, that "you must return to duty for your regular scheduled shift." The petition for appeal contained a statement by petitioner setting forth the reason for his having been absent from the Atlantic City Tower during the period of time from August 4, 1981 to August 7, 1981, in that he was on annual leave. The petition contained a copy of the Atlantic City Watch Tower Schedule which indicated that D. Della Porta was scheduled for annual leave for this period of time. The FAA failed to answer to the appeal under date of November 12, 1981, denying any and all allegations made by the petitioner in the appeal petition.

On March 29, 1982, petitioner filed a motion for summary judgment relying upon answers to the agency's interrogatories, the petitioner's request for admissions, Article 7 of the Provisions of the Collective Bargaining Agreement between the Professional Air Traffic Controllers Organization and the Federal Aviation Administration revision dated October 1979, the Watch Tower Schedule and the affidavits of both Robert Testa and the petitioner. Upon consideration, the hearing officer, Mitchell Kastner, entered an order denying the motion.

The case came on for hearing and trial before the Honorable Roger A. Schwartz, Presiding Official of the United States of America, Merit Systems Protection Board, Philadelphia Regional Office, without a jury, at the Federal Aviation Admissions Atlantic City Tower following which the Board filed a written opinion

and decision. The Board found that the petitioner's leave was cancelled by his supervisor on August 1, 1981, relying on the testimony of the Chief Controller. Since he had been advised that if a strike occurred his leave would be cancelled, the agency had established a prima facie case that the petitioner was striking against the federal government on the dates of August 4, 5 and 6, 1981. The Board also found that prior to the strike, the petitioner was scheduled for leave from August 3-August 7, 1981 and that this leave had been cancelled in the event of a strike.

The petitioner makes the argument that the agency did not formally declare an operational emergency before cancelling the petitioner's leave as required by the Collective Bargaining Agreement and contract between PATCO and the FAA. It then found as a fact that the agency did not declare an operational emergency as required by the agreement and asserts that the proper action would have been to terminate his vacation, appear for work, and then grieve the agency action later. The Board then found as follows: The deciding official did not consider a written reply to the advanced notice of proposed removal which was filed by the petitioner within the time permitted. Even though the Board found that the failure to consider the bona fide reply is clearly procedural error, it stated the evidence in this case did not show that a proper consideration of the reply would have changed Mr. Testa's mind on the removal action. Since these arguments have been determined by the Board and would not be sufficient to change the outcome of the removal action, the Board made a determination.

This petition appeal followed to the United States Court of Appeals for the Federal Circuit. The case was heard and considered and the judgment of the Merit Systems Protection Board was affirmed on June 24, 1985 (Appendix, *infra* at 2a). The judgment was issued as a mandate on July 16, 1985 (4a).

JURISDICTION

Donald Della Porta, petitioner, seeks a writ of certiorari from the final judgment of the United States Court of Appeals for the Federal Circuit dated June 24, 1985. The decision was issued as a mandate on July 16, 1985 (1a). The jurisdiction of this Court is invoked under 5 U.S.C. §§ 7511(a)(1)(A), 7512(1) and 7513(d) which provides that an employee in the competitive service who is not serving a probationary period may appeal an action removing him from the federal service; and the first section of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Donald Della Porta, is a veteran with 14 years of government service and for the past 11½ years has been a professional Air Traffic Controller. He has been a member of PATCO since 1971 and the treasurer of Local Chapter #213 of that organization since April of 1981.

On August 1, 1981, he was a GS12 Air Traffic Controller Specialist with an annual salary of $35,033 per year assigned to the Atlantic City New Jersey Tower. He had a good reputation as a controller and had never previously received any disciplinary action. His working ability was satisfactory. He had received no criticism, only good comments. In April or May of 1981, his supervisor, Edward Murzyn, granted him annual leave, a portion of which was to commence on August 4, 1981.

On August 2 and 3 of 1981, petitioner was absent from his place of employment on his regular days off, and on August 4, 1981, his annual leave commenced, which annual leave extended up to and including midnight of August 8, 1981. The duty schedule called for him to report for work for the shift commencing at midnight following the evening of August 7, 1981, until 8 a.m.

of August 8, 1981. At approximately 7 p.m. EDT on August 3, 1981, a nationwide strike of Air Traffic Controllers occurred.

At 9:10 a.m. Friday morning, August 7, 1981, petitioner went to the FAA Air Traffic Facility. Petitioner was told by Robert Testa, Chief Controller of the Atlantic City Tower that he could not return to work, that his proposal to remove letter had been prepared and would be delivered to him and was specifically told that he could not return to work for his regular shift as his moratorium period had expired.

By communication dated August 7, 1981, petitioner was advised that Robert C. Testa, the Chief Controller at the Atlantic City Tower, intended to remove him from his position, in that he had participated in a strike against the government of the United States, which was a crime, in that he failed to report for duty at 1548 p.m. on August 4, 1981, that he had an unauthorized absence from the 1548 p.m. to 2348 p.m. shift of August 3, 1981, and that he had seven days from receipt of said notice in which to reply. This notice was received by him on August 12, 1981.

Under date of August 11, 1981, petitioner, denying that he had committed a crime, requested a 20-day extension of time to file a response and requested a review of all materials relied upon by the FAA to support its proposed action. On the same date, he requested the production of the documents supporting any adverse personal action under the Freedom of Information Act, together with a response to the proposed removal action, indicating that confusion and ambiguity existed with reference to the 24-hour amnesty and reasserting that on August 4, 1981 from 1548 p.m. to 2348 p.m. was not his next assigned shift to work. At 1:22 p.m. on August 14, 1981, Robert C. Testa sent a mailgram to petitioner denying the request for extension of time and indicated that if he wished to make a reply, he could review the materials relied upon and would be given a reasonable amount of time to

submit a written response, as long as the response was submitted prior to the expiration of the seven-day period. Thirteen minutes later, at 1:35 p.m. on August 14, 1981, Mr. Testa forwarded another mailgram, indicating that his original letter of intent of removal was self-explanatory and that he would not elaborate on the same, and reminded petitioner that any reply must be presented or scheduled within the seven-day calendar limit. Under date of August 16, 1981, Donald Della Porta submitted a written reply to Mr. Testa, asking him to forward him a copy of the posted two-week watch schedule, which included the week of August 2-8, indicating that he was on approved annual leave from August 4 to the 7th and was not scheduled to return to work until midnight of August 7, 1981. This reply was received by Robert Testa on August 19, 1981, but was ignored and not considered by him in arriving at his decision of removal which was rendered on the same day.

REASONS FOR GRANTING THE WRIT

Under the provisions of the Merit Systems Protection Board, an employee who is intended to be removed from his position by his employer must be given a reasonable time in which to file an answer to the employer's charges and complaints against him. In no event can this time be less than 7 days from the receipt by the employee of the Notice of the Intention to Remove, 5 U.S.C. § 7513(b)(2). On August 7, 1981 the Federal Aviation Administration by Robert C. Testa, their Chief Controller at the Atlantic City Tower forwarded a Notice of Intention to Remove the petitioner from his position of employment. The letter contained the following language: "Therefore, you may reply to this Notice personally, in writing, or both, and furnish Affidavits and other documentary evidence in support of your answer to me, within 7 calendar days after you receive this letter." This letter was sent by certified mail on that date and was received by petitioner on August 12, 1981.

By letter dated August 11, 1981, petitioner requested an extension of time, requested the production of information that would permit him to prepare a defense and denied the charges against him. Then by separate typewritten letter dated August 16, 1981, which was received by Robert Testa on August 19, 1981, within the 7 days statutory limitation, petitioner made a further request for the Watch Schedule and set forth with particularity that there had been no communication to him that he was to report for duty at any time prior to midnight of August 7, 1981.

At the hearing before the Merit Systems Protection Board, the presiding official found as a fact that the deciding official did not consider the second written reply and that failure to consider the reply was clearly procedural error. He then went on to say that he did not think it was harmful error because, "The evidence in this case does not show that proper consideration of this reply would have changed Mr. Testa's mind on the removal action."

It is respectfully submitted that from the sworn testimony and an actual inspection of the documentation in the form of the duty schedule, the personal log, and the T and A Report, it is clearly shown that a return to duty time prior to midnight of August 7, 1981 had never been communicated to the employee or could possibly have been made known to him. For the presiding official to say that it is perfectly alright for the decision officer to ignore the facts set forth in the employee's answer on the proposition that, "Do not confuse me with the facts, my mind is already made up," is untenable. Such a proposition is also contrary to both the prior decision of the Board in the case of *Jones v. TVA, MSPF,* Dkt. AT07528110307 (1982), and the statutory mandate that the Merit Systems Protection Board affirm an agency decision that shows harmful error. 5 U.S.C. § 7701(c)(2). One must ask the question, "Why the haste, if the matter of the removal of Mr. Della Porta is not the sandbagging

of an individual on the pre-existing hit list?" Such a list was found to exist in the case of *United States v. Haggerty,* 528 F. Supp. 1286 (D. Colorado 1981). What is more harmful error than to fail to carefully consider all of the facts and circumstances set forth in an answer. The facts should be deliberated not eliminated.

The entire manner in which the decision-maker herein acted is repugnant to Justice Brennan's opinion in the case of *Goldberg v. Kelly,* 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), which held that the decision must rest solely on the legal rules and evidence adduced at the time of the hearing. An impartial decision-maker is essential. Prior involvement in some aspects of a case will not necessarily bar an official from acting as a decision-maker. He should not, however, have participated in making the determination under review. This is a fundamental problem in the instant case. Chief Testa, the decision-maker, states that he gave an unequivocal order to cancell Mr. Della Porta's leave and in his mind he believes that to be unequivocally true. The recipient of the order, Superintendant Murzyn, says that he received a conditional equivocal order cancelling the leave only when and if there is a strike. As a decision-maker by reason of the prior involvement, how can he possibly be objective? Under the Supreme Court's standard for procedural due process, Chief Testa should have not participated in making the determination presently under review.

In addressing the question of the 7-day notice as it applied to the procedure followed by the City of New York, Justice Brennan said:

> "We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient per se, although there may be cases where fairness would require that a longer time be given."

Under what other circumstances would it be more important to receive appropriate juridical demeanor than the termination of an employee's career after 14 years of faithful service.

CONCLUSION

For these reasons, this Court should grant this writ of certiorari.

Respectfully submitted,

JOEL A. MOTT, JR.
MOTT AND MOTT
Attorneys for Petitioner

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 83-1297

DONALD DELLA PORTA,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,

Respondent.

DECIDED: June 24, 1985

Before FRIEDMAN, *Circuit Judge,* Miller,* *Senior Circuit Judge,* and NIES, *Circuit Judge.*

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* Judge Miller assumed senior status on June 6, 1985.

Decision

NIES, *Circuit Judge.*

DECISION

The decision of the Merit Systems Protection Board in Case No. NY075281F1326, sustaining the removal of petitioner by the Department of Transportation, FAA (agency) for striking against the United States Government and absence without leave from August 4 to August 7, 1981, is *affirmed.*

DISCUSSION

Petitioner contends that, under the union contract, his annual leave was not legally cancelled since the agency never formally declared the existence of an "operational emergency." This argument was specifically rejected in *Letenyei v. Department of Transportation, FAA,* 735 F.2d 528, 531 (Fed. Cir. 1984), wherein this court held that the threat of a national strike by air traffic controllers constituted an operational emergency, justifying the cancellation of annual leave.

Petitioner also raises, apparently for the first time on appeal, an issue regarding the sufficiency of his leave cancellation. The presiding official found that petitioner was advised by the agency on at least three occasions that his annual leave would be cancelled in the event of a strike. Petitioner argues, however, that the agency's cancellation of his leave was ineffective since the agency never actually contacted him on the day of the strike to notify him that his leave had been cancelled and that he was to report for work at a certain time and hour. The argument ignores that the strike was one of general knowledge. *Schapansky v. Department of Transportation, FAA,* 735 F.2d 477, 482 (Fed. Cir.), *cert. denied,* 105 S. Ct. 432 (1984). Petitioner introduced

no evidence indicating either that he was unaware that a strike was in progress or that he had misunderstood the agency's repeated warnings that his leave would be cancelled if a strike occurred. Accordingly, the agency's *prima facie* case of strike participation stands unrebutted.

Regarding the deciding official's failure to consider petitioner's second written response, the presiding official concluded that such error was harmless. The second response merely argued the legal issue of the propriety of the agency's cancellation of leave under the union agreement. The deciding official testified that the argument did not change his mind and, indeed, the agency's contrary position on this issue is basic to the action taken against petitioner. Moreover, we have specifically rejected the union contract argument, as discussed above.

Finally, petitioner argues that the agency improperly used "selective enforcement" by rehiring certain air traffic controllers but not petitioner. The FAA, however, had the authority to assess its litigative risk in individual cases and is under no obligation to rehire petitioner simply because other cases have been settled.

Decision

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NO. 83-1297

NY075281F1326

DONALD DELLA PORTA,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION, FAA,

Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

ENTERED BY ORDER OF THE COURT
George E. Hutchinson, Clerk

/s/George E. Hutchinson

DATED June 24, 1985

ISSUED AS A MANDATE: JULY 16, 1985
COSTS: Against, Petitioner, Donald Della Porta
PRINTING ———————— $26.08
TOTAL———————————— $26.08

DECISION OF MERIT SYSTEMS PROTECTION BOARD

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

DONALD DELLA PORTA

v.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Initial Decision Number: NY075281F1326
Date: 26 Oct. 1982

INTRODUCTION

Mr. Donald Della Porta appealed on September 10, 1982 from an action taken by the Department of Transportation, Federal Aviation Administration, Atlantic City Airport Tower, to remove him from the position of Air Traffic Controller, GS-12, effective September 2, 1981. An evidentiary hearing was held on this appeal on September 2, 1982.

JURISDICTION

Under 5 U.S.C. Section 7701(a) an employee may appeal to the Merit Systems Protection Board from any action which is made appealable to the Board under any law, rule, or regulation. Applicable law provides that an employee in the competitive service, who is not serving a probationary period may appeal an action removing him from the Federal service. 5 U.S.C. Section 7511(a)(1)(A), 7512(1) and 7513(d).

Decision

The record shows that the appellant was an employee in the competitive service, that he was not serving in a probationary period, and that he was removed from his position with the Federal Aviation Administration. Accordingly, I find that this appeal is acceptable for adjudication.

ANALYSIS AND FINDINGS

The agency effected this action based on the charges that appellant was striking against the Federal Government from August 4 to August 7, 1981; and that he was absent without leave for those dates. Since this agency action was taken in accordance with the provisions of 5 U.S.C. Section 7512 and Part 752, Subpart C of the Office of Personnel Management Regulations, 5 C.F.R. 752.301, the burden of proof imposed upon the agency must comply with that established by 5 U.S.C. Section 7701(c)(1)(B). That is, the agency must support its case by a preponderance of the evidence before the MSPB can affirm the agency action on appeal. A preponderance of the evidence is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true, 5 C.F.R. 1201.56(c)(2).

In addition to proving its case by a preponderance of the evidence, the agency must also prove that its actions were taken for such cause as promotes the efficiency of the service. 5 U.S.C. Section 7513(a). *See Phillips v. Bergland,* 586 F.2d 1007, 1010-11 (4th Cir. 1978); *Young v. Hampton,* 568 F.2d 1253, 1257 (7th Cir. 1977); *Allen v. United States Postal Service,* 2 MSPB 582 (1980); *Doe v. Hampton,* 566 F.2d 265 (D.C. Cir. 1977); *Norton v. Macy,* 417 F.2d 1161 (D.C. Cir. 1969). As a separate element of this analysis it is also necessary to detemine the reasonableness

of the penalty chosen under the facts and circumstances of the case; even if it is found that the action was taken for the efficiency of the service, as required by statute. *See Douglas v. Veterans Administration,* MSPB Dkt. No. AT075299006 (April 10, 1981); *Snipes v. United States Postal Service,* MSPB Dkt. No. AT075209206 (May 19, 1981); *Wanner v. United States Postal Service,* MSPB Dkt. No. CH07528010032 (June 10, 1981). Thus, my decision will first reflect an analysis of the evidence, whether the action taken was for such cause as promotes the efficiency of the service and finally whether the penalty chosen was reasonable under the circumstances of the case factors cited in *Douglas, supra.*

An employee is striking against his/her employer when he/she refuses, in concert with others, to provide services to that employer. *United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879 (D.D.C.), *aff'd,* 404 U.S. 802, 92 S. Ct. 80 (1971). Such refusal, as a matter of intent, is usually proven by circumstantial evidence. *See Tucker v. United States,* 624 F.2d 1029 (Ct. Cl. 1980); *Filson v. Department of Transporation,* MSPB Dkt. No. DC07528010253 (December 2, 1981). In proving that an employee struck against the government, the agency has the initial burden of establishing a *prima facie* case that appellant was, in fact, striking on the dates charged in the advance notice. A *prima facie* case is established by showing that a strike was called, that appellant was a member of the striking union, that appellant did not appear for work as scheduled; that he did not advise the agency why he was absent or that his excuse for his absence was unreasonable. *See Jones v. TVA,* MSPB Dkt. No. AT07528010300 (February 19, 1982); *Duckett and Yardley v. TVA,* MSPB Dkt. No. AT07528010325 (February 19, 1982); *TVA v. Bailey,* 495 F. Supp. 711 (E.D. Tenn. 1980). In analyzing the *prima facie* case, one can consider evidence of an appellant's presence on a picket line, but such presence does

not, by itself, establish that appellant refused, in concert with others, to provide services to his employer. *See Bailey, supra.* Once the *prima facie* showing is made, the appellant then has the burden of coming forward with evidence to rebut it, although, of course, the burden of proof and the burden of persuasion always remains with the agency. *See Jones, supra.*

5 C.F.R. 1201.56 provides that a Presiding Official may take official notice of matters of common knowledge, or matters that can be verified. The Board itself discussed at length the propriety of taking official notice of the commencement and duration of the strike action in question in this appeal, *Ketchem v. FAA,* MSPB Dkt. No. DA075281F0713 (May 28, 1982). That case concluded by taking official notice that an unlawful strike of air traffic controllers occurred from August 3, 1981 through August 6, 1981. *Id.* at 9. That decision also noted, however, that for individual cases, wherein the issue of an appellant's strike activity after that date comes into question, it was inappropriate to take official notice of the continuation of the strike beyond August 6; and that it was subject to proof by the agency. *Id.* at 6. The agency has produced no evidence that as to this appellant, the strike went past August 6, 1981. In fact, the evidence establishes that this appellant attempted to return to work on August 7, 1981, H.T. pp. 16, 17, 36-38, but was denied entrance onto duty.

The agency produced evidence showing that appellant was counseled by his supervisor on the illegality and probable consequences of striking against the Federal Government, and the meaning of PL 1918 which prohibits that action, H.T. pp. 20, 21, 35. It was apparent that appellant understood his supervisor's remarks, H.T. p. 21. Appellant was advised on at least three occasions that any leave he had would be canceled should a strike occur, H.T. pp. 64-66, 74, 77-80. Appellant's leave,

during the period August 4-8, 1981, was canceled by his supervisor on August 1, 1981, H.T. pp. 12-16. When a strike was called by appellant's union, neither the appellant, nor any other air traffic controller showed up for work on August 3, 4, 5, 1981, H.T. pp. 8, 9, 86. The appellant did not contact the agency during this period to give an explanation for his absence, H.T. p. 17. After his removal was proposed, appellant gave a standard PATCO written response to the notice without giving any explanation for his absence on the days in question, H.T. p. 19. Appellant did not give any oral reply to the advance notice, H.T. p. 19.

From this evidence, I conclude that the agency has established a *prima facie* case that appellant was striking against the Federal Government on August 4, 5, 6, 1981.

The appellant did not offer any rebuttal testimony to this charge. An appellant's failure to defend, taken alone, does not satisfy the agency's burden of proving its case; however, an appellant's silence in an administrative proceeding can be used as one factor to help evaluate the weight of the evidence without offending Fifth Amendment guarantees against self-incrimination. This does not amount to compulsion prohibited by the amendment because the silence, in and of itself, is insufficient to support an adverse decision. *Book v. United States Postal Service,* MSPB Dkt. No. SL07528010067 (May 26, 1981), *affirmed* 675 F.2d 158 (8th Cir. 1982).

Inasmuch as the agency has shown its *prima facie* case and the appellant has not successfully rebutted it, I find that the charge of striking is sustained by a preponderance of the evidence, for August 4, 5, 6, 1981.

Decision

As to the second charge, in order to prove that an employee is AWOL, the agency must show that the individual was absent from duty on the dates specified in the advance notice; *Conner v. U.S. Postal Service,* MSPB Dkt. No. DC07528101166 (March 16, 1981); that his/her absence was not authorized or that a request for leave was not authorized or properly canceled, so as to deprive the employee of proper notice of the agency cancellation. *See In Re Van Sciver,* 1 MSPB 94 (1979) *Chiriaco v. United States,* 234 F. Supp. 850 (N.D. Ala. 1963); *Greene v. Department of the Navy,* MSPB Dkt. No. AT075209273 (April 28, 1981); and circumstances beyond his/her control did not prevent the individual's appearance at work; *Kramer v. Department of the Navy,* MSPB Dkt. No. SE07528010066 (May 14, 1981).

Prior to the strike, appellant had regularly scheduled leave for August 3 to 7, 1981, and would have normally been expected back on duty on August 8, H.T. p. 11. Nonetheless, the evidence is clear that appellant was notified orally and by agency documents that his leave would be canceled in the event of a strike, H.T. pp. 28, 29; although he was never actually contacted on the day of the strike to come in, H.T. pp. 81, 82, 84, 85. The appellant shows no evidence that he was unaware that a strike had been called on August 3. In addition, the wide publicity given this event, as well as appellant's subsequent efforts to return to work on August 7, indicate that appellant had knowledge that a strike was in progress. He also shows no evidence that circumstances beyond his control prevented him from returning to work.

Notwithstanding the above, appellant makes the argument that his leave was not properly canceled, in accordance with Article 28, Section 1 of PATCO's Collective Bargaining Agreement. The evidence does show that the agency did not formally declare an operational emergency before canceling appellant's leave, as

required by the agreement, H.T. pp. 54-61, 96. However, the proper action for appellant in this case would have been to appear for work, even though he had annual leave and it appeared to be improperly canceled; and then grieve the agency action later, according to the established collective bargaining agreement, or other regulatory grievance scheme that existed in the agency. "To find otherwise would have the effect of undermining the statutory scheme established to preserve employee rights without unreasonably preventing agencies from carrying out their missions." *Gragg v. United States Air Force,* MSPB Dkt. No. DA07528101034 (September 16, 1982); *see Walker v. Birmingham,* 388 U.S. 307 (1967). The appellant's allegation, therefore, presents no viable defense to this matter. Regardless of the propriety of the agency action he had an obligation to appear at work. Consequently, I find he was absent without leave, as charged.

An agency may take an action against an employee under 5 U.S.C. Chapter 75 only for such cause as will promote the efficiency of the service. 5 U.S.C. Section 7513(a) (1980). In prior decisions, the Board has held that unauthorized absence from duty constitutes proper grounds for removal since, by its very nature, it disrupts the efficiency of the service. *Bolling v. Department of the Air Force,* MSPB Dkt. No. NY07528090034 (December 28, 1981); *Desiderio v. Department of the Navy,* 4 MSPB 171 (1980). In addition, the appellant's willful participation in a strike, an activity which is defined as a concerted stoppage of work by employees, likewise, by its very nature disrupted the efficiency of the Federal Aviation Administration in completing its important mission of controlling air traffic throughout the United

States.[1] Therefore, I conclude that this agency action was taken for such cause as promotes the efficiency of the service.

Notwithstanding the above, however, it is still necessary for the agency to show that the particular penalty in the case at hand was appropriate and reasonable under the circumstances of this case. In this regard, the purpose of the Board's review of the penalty is to assure that the agency conscientiously considered the relevant factors, and, in choosing the penalty struck a responsible balance within the limits of reasonableness. *See Snipes v. United States Postal Service,* MSPB Dkt. No. AT075209206 at 2-3 (May 19, 1981); *Wanner v. United States Postal Service,* MSPB Dkt. No. CH07528010032 (June 10, 1981); *Lancaster v. Department of the Navy,* MSPB Dkt. No. PH07528010056 (June 9, 1981).

The evidence is clear that the most relevant factor relied upon by the agency and the deciding official in this case is the statutory provision of 5 U.S.C. Section 7311(3) (1980) that: "An individual may not accept or hold a position in the Government of the United States . . . if he . . . (3) participates in a strike . . . against the Government of the United States . . ." *See* Advance Notice. Thus, the plain language of the statute prohibits a person who participates in a strike against the Federal Government from holding a position in the Government. Although the statute does not specifically provide for a removal action against such an employee, removal

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1. In *United States v. Restor, et al.,* Crim. No. 81-187 Slip Op. at 8-9 (W.D. Pa. January 13, 1981), Judge Diamond took judicial notice that the strike by the air traffic controllers resulted in hardship and inconvenience to the public, increased unemployment of innocent people and a loss of millions of dollars in the airline industry. He stated that the controllers' conduct was "uniquely anti-social".

is obviously the only penalty which can produce the result of having the striking person not "hold a position" in the Federal Government. Since the language in the statute is plain, it controls, unless there is a "clearly expressed legislative intention to the contrary;" *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), or unless it would lead to absurd results. *Commissioner v. Brown*, 380 U.S. 563, 571 (1965). As *Ketchem, supra,* notes:

> The Board finds, . . . that a long line of judicial precedent mandates the conclusion that the strike by air traffic controllers was indeed unlawful under 5 U.S.C. Section 7311 and 18 U.S.C. Section 1918 . . . These statutory prohibitions of strikes against the Government of the United States were carefully examined and held to be Constitutional by a three-judge panel of the United States District Court for the District of Columbia and such holding was affirmed by the Supreme Court . . .
>
> [Ketchem cites the following cases for its conclusions: *U.S. v. Haggerty*, 528 F. Supp. at 1290; *Air Transport Association v. PATCO*, 516 F. Supp. 1108 (E.D. N.Y.), *affirmed*, 667 F.2d 316, 321 (2d Cir. 1981); *TVA v. Bailey*, 495 F. Supp. 711, 712 (E.D. Tenn. 1980); *Air Transport Association v. PATCO*, 453 F. Supp. 1287 (E.D. N.Y. 1978); *United Federation v. Blount*, 325 F. Supp. 879, 885 (D.D.C.), *affirmed*, 404 U.S. 802 (1971)]

The most recent case yet on point in this regard is *American Postal Workers Union v. U.S. Postal Service*, No. 80-4250 (9th

Cir. June 8, 1982). In this case, the court addressed the question of whether an arbitrator's decision requiring the Postal Service to reinstate an employee who had been removed for striking was illegal. The court evaluated the facts of the case and concluded that the removed employee had participated in the strike and that his reinstatement would violate 5 U.S.C. 7311. Thus, the Ninth Circuit Court of Appeals has interpreted the statute to require appellant's removal.

In similar statutory penalty cases, the Board has observed that agencies may not impose and the Board may not approve lesser penalties than those prescribed by statute. In reviewing a case involving violation of 31 U.S.C. 638a(c)(2) (misuse of a government vehicle), the Board noted that the agency could not properly impose a lesser penalty than that provided by the statute. *Woody v. General Services Administration,* MSPB Docket No. SF07528110028 (June 2, 1981). In a settled case, the Board refused to approve an agreement reached by the parties because the settlement contemplated a penalty less than that required by statute. *Special Counsel v. Dukes,* MSPB Docket No. HQ12060020 (October 29, 1981).

The agency asserts that once it found the appellant to be a striking employee it had no other choice but to effect his removal by adverse action procedures. The law supports this argument. Therefore, the penalty chosen for charge 1 was appropriate and reasonable under the circumstances of this case.

Likewise, unauthorized absence from duty has been held to be proper grounds for removal, *Desiderio, supra,* and this is especially true when the absence is prolonged, with no foreseeable end in sight. *See McKenzie v. U.S. Postal Service,* 1 MSPB 480, 481 (1980); *Dornan v. Internal Revenue Service,* MSPB Dkt. No.

NY07528110014 (September 1, 1981). Therefore, I find that appellant's removal on the combined charges of striking and AWOL was not unreasonable in this case.

The appellant makes a procedural argument that the deciding official, Mr. Testa, did not consider a second written reply by the appellant, to the advance notice of proposed removal, dated August 19, 1981. The final decision letter, dated August 19, 1981, and Mr. Testa's testimony bears this out, H.T. pp. 45-48. Failure to consider a *bona fide* reply to the advance notice is clearly procedural error, *Jones v. TVA,* MSPB Dkt. No. AT07528110307 (August 23, 1982).

In accordance with 5 U.S.C. Section 7701(c)(2), MSPB may not affirm an agency decision that shows harmful error in the application of the agency's procedures in arriving at a decision. This reason for reversal of an agency decision is considered to be an affirmative defense afforded the appellant, and, in accordance with MSPB Regulation, 5 C.F.R. 1201.56, the burden of proof must be carried by a preponderance of the evidence. *Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980). Further, any error so shown must be likely to have had a harmful effect upon the outcome before the agency, thereby being prejudicial. *See Parker* at 493.

In judging the harmfulness of the error, *Parker* states:

> Application of the harmful error standard may be relatively simple when subsequent events make obvious the error's actual effect . . . But when subsequent events do not reveal with clarity whether the error was actually prejudicial, the probable effect of the error must be determined

> in light of all the evidence in the circumstances of the particular case. *Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980) at 493.

The evidence in this case does not show that proper consideration of this reply would have changed Mr. Testa's mind on the removal action. *See* H.T. pp. 45-48. Examination of the letter merely shows that appellant made his argument that he had advance annual leave and that it was not canceled properly. These arguments have been already addressed and have been shown to be insufficient to change the outcome of appellant's removal action. Therefore, this affirmative defense must fail.

Accordingly, having reviewed all the evidence of record, and having found that the charges are sustained by the preponderance of the evidence; further, noting the penalty as reasonable, in this case, the agency removal action is affirmed.

DECISION

The agency removal action is affirmed.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on 30 Nov. 1982 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal, the Director of the Office of Personnel Management, or the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth specific objections

to the initial decision, supported by references to applicable laws or regulation, and with specific reference to the record. The petition for review must be filed with the Secretary of the Merit Systems Protection Board, Washington, D. C. 20419 no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

> (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
>
> (2) The decision of the Presiding Official is based on an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. Section 7703(b)(1)[1], the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit no later than thirty (30) days after appellant's receipt of the Board's final decision or order.

For the Board:

/s/ Roger A. Schwartz
Roger A. Schwartz
Presiding Official

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1. As modified by Section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. Section 1295(a)(9).